



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 30, 2004

Mr. Michael J. Westergren  
In House Counsel  
Del Mar College  
101 Baldwin Boulevard  
Corpus Christi, Texas 78404-3897

OR2004-10959

Dear Mr. Westergren:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215914.

Del Mar College (the "college") received two requests for information regarding the requestor's employment with the college and his subsequent dismissal. You state that you have released some of the requested information but claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. The college has not submitted information for the first request for documents showing the college's compliance with certain school policy. To the extent such information exists, we assume the college has released it. *See* Gov't Code §§ 552.301, .302. We have considered the exception you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code excepts from disclosure information protected by the attorney-client privilege. When asserting the attorney-client privilege under section 552.107(1) of the Government Code, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or

among clients, client representatives, lawyers, and lawyer representatives.<sup>1</sup> TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) of the Government Code generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

In this instance, some of the communications were not communications made between privileged parties as they were communications with the requestor who is the grievant, and other communications were not made in the furtherance of the rendition of legal services. Therefore, we find that you have not met your burden of demonstrating the elements of the attorney-client privilege. Consequently, the college may not withhold any of the submitted information under section 552.107(1) of the Government Code.

We note, however, that the submitted information includes information subject to section 552.101 of the Government Code.<sup>2</sup> Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes,

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<sup>1</sup> Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

<sup>2</sup> This office will raise a mandatory exception like section 552.101 of the Government Code on behalf of a governmental body but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

including the Family Educational Rights and Privacy Act of 1974 ("FERPA"). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student. *See* 20 U.S.C. § 1232g(b)(1), (d) (for student eighteen years of age or attending institution of postsecondary education, permission or consent required of and rights accorded to parent under FERPA are required of and accorded to student); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code, and provides that "information contained in education records of an educational agency or institution" is not subject to required public disclosure under chapter 552 except in conformity with FERPA. Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution, or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent reasonable and necessary to avoid personally identifying a particular student. *See* Open Records Decision Nos. 332 (1982), 206 (1978). We have marked information in the submitted documents that is confidential under FERPA and must be withheld.

We also note that the submitted information includes e-mail addresses that may be excepted from disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We note that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the e-mail address of the individual as a government employee. You do not state that the individuals whose e-mail addresses we have marked have consented to the release of their e-mail addresses. We note that the requestor's e-mail address has not been marked because he has a special right of access to his own e-mail address pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interests). Accordingly, the college must withhold the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code unless the individuals to whom these e-mail addresses pertain have consented to their release.

Finally, we note that the submitted documents include information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home address and telephone number, social security number, and family member information of current or former officials or

employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). If the employee at issue elected prior to the receipt of this request to keep the information we have marked confidential, the college must withhold this information pursuant to section 552.117(a)(1). The college may not withhold this information under section 552.117 if the employee at issue did not make a timely election to keep this information confidential.

In summary, we conclude that the college must withhold the student identifying information we have marked pursuant to section 552.101 of the Government Code in conjunction with FERPA. The college must also withhold the marked e-mail addresses under section 552.137 of the Government Code unless consent has been given by the individuals at issue for their release. If the employee at issue made a timely election pursuant to section 552.024 of the Government Code, the college must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Caroline E. Cho  
Assistant Attorney General  
Open Records Division

CEC/sdk

Ref: ID# 215914

Enc. Submitted documents

c: Mr. Alberto Benitez  
159 East County Road 2130  
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(w/o enclosures)